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Supreme Court, U.S.
FILED

No. 061460 MAR 21 2007

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In The

Supreme Court of the United States

GENARO GONZALEZ-RAMIREZ, A90-504-667,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

GENARO GONZALEZ-RAMIREZ
Petitioner Pro Se
22111 Newport Ave.
Space 175
Grand Terrace, CA 92313
(909) 693-0244

QUESTION PRESENTED

1. Whether a prior conviction for violation of California Penal Code § 261.5 is an aggravated felony, "sexual abuse of a minor," as defined as 8 U.S.C. § 1101(a)(43)(A) for a resident alien.

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OPINION BELOW

The Ninth Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. A copy of the decision is included in the appendix of this Petition. *See* App. 1.

JURISDICTION

The Ninth Circuit filed its decision on December 21, 2006, and entered an order dismissing petitioner's petition for review, and granting respondent's motion to dismiss for lack of jurisdiction. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari. Judicial review of constitutional and legal claims is available to aliens pursuant to 8 U.S.C. § 1252(a)(2)(D).

STATUTORY PROVISION INVOLVED

8 U.S.C. § 1101(a)(43)(A)

(a) As used in this [Immigration and Nationality] Act – . . . (43) The term "aggravated felony" means – murder, rape, or sexual abuse of a minor.

STATEMENT OF FACTS

Petitioner is a legal permanent resident of the United States, the son of legal permanent residents (his mother may be a derivative U.S. citizen, but proof of her birth to a U.S. citizen is so far unavailable), and is completely

assimilated to life in the United States and the English language having lived here since boyhood. He is married to a U.S. citizen, and works two jobs to support their five children, as well as three from a previous marriage.

Petitioner's conviction at issue in this case is his only conviction. He was charged along with his cousin after a party at a motel. Both had had sex with girls under the age of eighteen.

Both men pled to probation conditioned by minor jail terms. Both men have completed their probation, have been rehabilitated, and have had their convictions deemed by the San Bernardino California Superior Court to be misdemeanors. Both have been allowed to withdraw their pleas, to substitute not guilty pleas to the charge, and have had their charge dismissed. Local San Bernardino County authorities have confirmed in writing to petitioner that, according to California law, he is *not* a sex offender, and that he is *not* required to register as one.

Petitioner's victim has forgiven him, and is willing to support his cause to remain a lawful permanent resident of the United States. However, petitioner's wife resents the victim, and wants petitioner to move his cause without any assistance from the victim.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CONTRADICTION WITHIN THE NINTH CIRCUIT BETWEEN *ALFRIDI* AND *LOPEZ-SOLIS*, AS TO WHETHER VIOLATION OF CALIFORNIA PENAL CODE § 261.5 IS SEXUAL ABUSE OF A MINOR AS DEFINED AT 8 U.S.C. § 1101(a)(43)(A).

The two cases in question, *Alfridi v. Gonzales*, 442 F.3d 1212 (9th Cir. April 4, 2006) and *United States v. Lopez-Solis*, 03-10059 (9th Cir. May 19, 2006), both concern aliens who were judged to have committed "statutory rape." Alfridi's statutory rape was judged to be sexual abuse of a minor, and therefore, became an "aggravated felon" for immigration purposes. Lopez-Solis, however, whose criminal conduct was the same as Alfridi's, was judged *not* to have sexually abused his victim. The Ninth Circuit rationalizes this contradiction in *Lopez-Solis*, *above*, by distinguishing the origin – from the district court -- of his case with Alfridi's whose case came to the Court of Appeals from a federal, administrative agency, the Executive Office of Immigration Review.

The rationale of the Ninth Circuit stated that the Circuit Court had to defer to the agency's interpretation of the phrase, "sexual abuse of a minor." Because the agency has interpreted the phrase broadly, Alfridi was deemed to have sexually abused a minor, because he violated California's statute. In the other case, Lopez-Solis, who violated a Tennessee law similar to California's, had his case reviewed de novo as to whether his conduct was sexual abuse of a minor. The Ninth Circuit decided that it was not, vacated the sentence and remanded for re-sentencing.

Thus, two aliens obtain two different results from the same court. The disparity in these results calls for rectification. Because the Ninth Circuit cannot easily reverse itself, this Court is the only authority that can resolve this unequal result.

II. THIS COURT SHOULD APPLY THE U.S. CONSTITUTION TO FIND THAT THE LAW VIOLATED IN THIS CASE IS NOT A CRIME OF MORAL TURPITUDE.

The violation of California Penal Code § 261.5 is a strict liability offense for which the perpetrator's intent is irrelevant to the question of guilt. Only the age disparity between the sex partners need be proved in court in order to obtain a guilty verdict.

A useful comparison to the crime in question is a conviction for driving with a blood alcohol level above a prescribed amount. For both offenses, only a number (age of victim, blood alcohol level) must be proven as an element to obtain a conviction. Mental state is irrelevant, and no criminal intent need be proven.

8 U.S.C. § 1101(a)(43)(A) includes conviction for murder and rape. Thus, petitioner has found himself to be convicted literally for "child rape." This is patently false, as petitioner has proven, and as California authorities agree. However, petitioner is so far unable to obtain relief from this accusation from the federal courts. That is why he comes here today.

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CONCLUSION

The Court should grant the petition for writ of certiorari and reverse the decision of the Ninth Circuit.

Respectfully submitted,

GENARO GONZALEZ-RAMIREZ
Petitioner Pro Se
22111 Newport Ave.
Space 175
Grand Terrace, CA 92313
(909) 693-0244

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENARO GONZALEZ-RAMIREZ, Petitioner, v. ALBERTO R. GONZALES, Attorney General, Respondent.	No. 06-72300 Agency No. A90-504-667 ORDER (Filed Dec. 21, 2006)

Before: GOODWIN, McKEOWN and FISHER, Circuit Judges.

We have reviewed the opposition to the motion to dismiss this petition for lack of jurisdiction, and we conclude that petitioner has failed to raise a colorable constitutional or legal claim to invoke our jurisdiction over this petition for review. Accordingly, respondent's motion to dismiss this petition for review for lack of jurisdiction is granted. *See* 8 U.S.C. § 1252(a)(2)(C), (D); *Afridi v. Gonzalez*, 442 F.3d 1212, 1215 (9th Cir. 2006).

All other pending motions are denied as moot. The temporary stay of removal confirmed by Ninth Circuit General Order 6.4(c) shall continue in effect until issuance of the mandate.

DISMISSED.

(2) Supreme Court, U.S.
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In The

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GENARO GONZALEZ-RAMIREZ, A90-504-667,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

GENARO GONZALEZ-RAMIREZ
Petitioner Pro Se
22111 Newport Ave.
Space 175
Grand Terrace, CA 92313
(909) 693-0244

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A90 504 667 – Los Angeles Date: Apr. 20, 2006

In re: GENARO GONZALEZ-RAMIREZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: J. Jack Artz, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

APPLICATION: Termination; cancellation of removal under section 240A(a); voluntary departure

This case was last before the Board on April 1, 2002, when we determined that the respondent was removable as charged, but remanded the record of proceedings to the Immigration Judge to allow the respondent an opportunity to submit an application for relief under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The respondent's appeal will be dismissed.[1]

[1] The respondent notes that the transcripts of the oral decisions rendered in this case are both dated January 3, 2005. However, the record reflects that the decision rendered by Immigration Judge Michael Suarez should be dated September 29, 1999. Since the respondent has already taken an appeal from that decision, which we decided on April 1, 2002, we will confine our review to the decision rendered by Immigration Judge George Proctor on January 3, 2005. On a related

(Continued on following page)

As the respondent, through counsel, acknowledged below, the Board's prior decision remanding the record of proceedings to the Immigration Judge to allow the respondent an opportunity to apply for section 212(c) relief was in error (I.J. at 2; Tr. at 69). In our prior decision, we noted that bars to section 212(c) relief enacted by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), and section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Div. C, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), do not apply retroactively to an alien who pleaded guilty or nolo contendere to an otherwise qualifying crime prior to IIRIRA's enactment. *See INS v. St. Cyr*, 533 U.S. 289 (2001). However, in this case, the respondent entered his guilty plea on July 3, 1997, and thus, falls outside the scope of *St. Cyr* decision. (I.J. at 3; Exh. 2). In addition, as we will discuss more fully below, because the respondent is removable on the basis of a conviction for sexual abuse of a minor under section 101(a)(43)(A) of the Act; 8 U.S.C. § 1101(a)(43)(A), he is ineligible for a waiver under former section 212(c) because the aggravated felony ground of removal has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act. *See Matter of Blake*, 23 I&N Dec. 722 (BIA 2005).

On appeal, the respondent, through counsel, challenges the Immigration Judge's decision of January 3, 2005, once again finding him removable as charged and denying his application for cancellation of removal under

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issue, we also note that the transcript of the record of proceedings was not prepared in chronological order. The correct ordering of the pages should be 1-31, 38-60, 32-37, and 61-71.

section 240A(a) of the Act, 8 U.S.C. § 1229b(a) and voluntary departure under section 240B(b) of the Act, 8 U.S.C. § 1229c(b). Relying on *Matter of Crammond*, 23 I&N Dec. 9, *vacated*, 23 I&N Dec. 179 (BIA 2001), the respondent argues that a misdemeanor conviction does not constitute an aggravated felony under section 101(a)(43)(A). We disagree. *See Matter of Small*, 23 I&N Dec. 448 (BIA 2002); *see also Fernandez-Ruiz v. Gonzales,* 410 F.3d 585, n. 4 (9th Cir. 2005) (noting that crime's designation as a misdemeanor did not preclude it from being classified as an aggravated felony) (*citing United States v. Alvarez-Gutierrez*, 394 F.3d 1241, 1243-45 (9th Cir. 2005) (sentence enhancement case finding that a misdemeanor can be an aggravated felony)). Accordingly, we affirm the Immigration Judge's conclusion that the respondent's 1997 conviction for unlawful sexual intercourse with a minor who is more than 3 years younger than the perpetrator in violation of section 261.5(c) of the California Penal Code constitutes sexual abuse of a minor, and is thus an aggravated felony under section 101(a)(43)(A) of the Act, rendering the respondent removable as charged under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii). *See Afridi v. Gonzales*, No. 04-76600, 2006 WL 851758, at *2-4 (9th Cir. April 4, 2006); *see also Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999). As such, we affirm the Immigration Judge's conclusion that the respondent is statutorily ineligible for cancellation of removal and voluntary departure, *See* sections 240A(a)(3), 240B(b)(1)(C) of the Act.

ORDER: The respondent's appeal is dismissed.

/s/ Roger Pauley
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Los Angeles, California

File A 90 504 667 January 3, 2005

In the Matter of

GENARO GONZALEZ-RAMIREZ,)
)
Respondent)

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(2)(A)(iii)

APPLICATION: Section 240(A)(a) of the Immigration and Nationality Act. Section 240(B)(b) of the Immigration and Nationality Act.

ON BEHALF OF RESPONDENT:

J. Jack Artz, Esquire
13031 San Antonio Drive
Suite 102
Norwalk, California 90650

ON BEHALF OF DHS:

Megan Berry, Esquire
Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a married male native and citizen of Mexico who entered the United States on or about July 7, 1989 when he was admitted as an immigrant. The Department of Homeland Security, then Immigration Service commensed removal proceedings by filing an order to show cause, charging respondent with removability pursuant to the above captioned section of the Immigration and Nationality Act. See Exhibit 1.

Respondent admitted the factual allegations contained in the order to show cause and conceded removability after first denying the charge and the charge was sustained. Therefore the court finds that removability has been established by clear and convincing evidence which is required by the Act to prevent that the respondent's removed (indiscernible) perhaps necessary. The court pursuant Section 241(B)(c)(2)(C) of the Act, designated Mexico as the country of which the respondent is a native and citizen.

This court before another Immigration Judge, held the respondent ineligible for this application under 42(a) by virtue of an aggravated felony. The Board of Immigration Appeals on April 1, 2002 remanded this matter after having found also respondent ineligible by virtue of commission of an aggravated felony, however, the matter was remanded for consideration of 212(c) relief.

The respondent concedes that by virtue of the date, the commission of his conviction that he does not qualify for 212(c) relief. However, the respondent did file an updated 42(a) application as previously mentioned paragraph. The issue in this case is whether the respondent has established statutory eligibility, cancellation of removal and whether it merits the relief as a matter of discretion.

APPLICABLE LAW AND LEGAL ANALYSIS

To be eligible for cancellation of removal under Section 240A(a) of the Act the respondent must establish among other things, that he has not been convicted of an aggravated felony. And the (indiscernible) case, in fact the respondent has been convicted of an aggravated felony.

He was on July 3, 1997 convicted in San Bernardino County Superior Court for the offense of unlawful sexual intercourse with a minor in violation of California penal code Section 261.5(c). On July 22, 1999 the Government issued a Notice to Appear.

Section 2440(d) of the Anti-terrorism and Effective Death Penalty Act (AEDPA) provides an alien who is deportable as an aggravated felon is ineligible also for Section 212(c) relief. The Supreme Court provided an exception to this rule for aggravated felons whose convictions were obtained through plea agreements entered prior to April 24, 1996. Respondent does not qualify for the exception to Section 2440(d) of AEDPA because he entered his plea after that.

Furthermore, the Board of Immigration Appeals has previously ruled that the respondent has committed an aggravated felony and thus does not apply for 42(a) relief.

Respondent also is ineligible for voluntary departure by virtue of commission of an aggravated felony. Therefore, the respondent's application for voluntary departure will be denied as well.

ORDER

IT IS HEREBY ORDERED that the respondent's application for cancellation of removal and adjustment of status pursuant Section 240A(a) of the Act be denied.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure be denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Mexico on the charge contained in the Notice to Appear.

GEORGE W. PROCTOR
Immigration Judge

A 90 504 667

January 3, 2005

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A90 504 667 – Lancaster, California Date: Apr. 1, 2002

In re: GENARO GONZALEZ-RAMIREZ a.k.a Genaro Gonzalez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: J. Jack Artz, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

APPLICATION: Termination of proceedings

In a decision rendered on September 29, 1999, an Immigration Judge found the respondent deportable as charged above and ordered him removed from the United States to Mexico. The respondent filed this timely appeal. The record will be remanded to the Immigration Judge.

The respondent, who was admitted to the United States as an immigrant on July 7, 1989, challenges the Immigration Judge's determination that his conviction for unlawful sexual intercourse with a minor in violation of Cal. Penal Code § 261.5(c) (West 1997) renders him deportable as an alien convicted of an aggravated felony as defined in section 101(a)(43)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A). The respondent has submitted evidence revealing that his conviction was set aside under section 1203.4 of the California Penal Code, and thus, he contends that he does not have a

conviction for immigration purposes. However, pursuant to section 101(a)(48)(A) of the Act (definition of a conviction for immigration purposes), we find that we are precluded from recognizing California's rehabilitative expungement. *See Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001); *see also Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002). Thus, we find that the respondent has a conviction for immigration purposes which supports a finding that he has been convicted of an aggravated felony (sexual abuse of a minor). *See Matter of Rodriguez-Rodriguez*, Interim Decision 3411 (BIA 1999).

With respect to the respondent's eligibility for relief from removal, we note that the United States Supreme Court in *INS v. St. Cyr*, 121 S. Ct. 2271 (2001), held that the bars to section 212(c) of the Act, 8 U.S.C. § 1182(c), enacted by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") (April 24, 1996), and section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) ("IIRIRA"), do not apply retroactively to an alien who pled guilty or nolo contendere to an otherwise qualifying crime prior to IIRIRA's enactment. Since the respondent entered a plea of guilt prior to the enactment of AEDPA, we find that the respondent comes within the scope of the Supreme Court's ruling in *St. Cyr*, *supra*.

Accordingly, the Immigration Judge's decision ordering the respondent removed will be vacated, and the record will be remanded in order to provide the respondent an opportunity to submit an application for section 212(c) relief.

ORDER: The Immigration Judge's order of removal to Mexico is vacated.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing decision and the entry of a new decision.

/s/ Juan P. Osuna
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

File No.: A 90 504 667

In the Matter of	)	
GENARO GONZALEZ-RAMIREZ,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended – Conviction at any time after admission of an aggravated felony as defined in section 101(a)(43) of the Act.

APPLICATIONS: Cancellation of removal, voluntary departure.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Jay Jack Artz, Esquire 1730 Huntington Drive, Suite 205 South Pasadena, California 91030	Alan Saxon-Youtsler, Esquire Assistant District Counsel Lancaster, California

ORAL DECISION OF THE IMMIGRATION JUDGE

In the charging document filed with the Immigration Court on August 3, 1999, the Immigration and Naturalization Service alleged, and the respondent, while represented by counsel, admitted, that the respondent is neither a citizen or a national of the United States but is instead a native and a citizen of Mexico who was admitted to the United States at Los Angeles, California, on or about July 7, 1989, as an immigrant.

The Service further alleged, and the respondent likewise admitted, that on or about July 3, 1997, in the Superior Court of the State of California, County of San Bernardino, the respondent was convicted for the offense of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator in violation of section 261.5(c) of the California Penal Code. The respondent's admissions establish these allegations by clear, convincing, and unequivocal evidence. They are also supported, to the extent of the conviction, by Exhibit No. 2.

The respondent is, therefore, deportable and, hence, removable from the United States, his denial to the contrary notwithstanding, as the Service has charged under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, in that the respondent has been convicted of an aggravated felony as defined in section 101(a)(43) of the Act. The Service did not list the specific subsection upon which it was relying to charge the respondent with removability as an aggravated felon in the Notice to Appear. However, given the course of proceedings, the Court finds that the respondent had ample notice that the subsection of section 101(a)(43) upon which the Service was relying had to do with the sexual abuse of a minor. Therefore, the Court finds that the respondent was not prejudiced by the absence of the listing of that specific section in Exhibit No. 1.

The respondent, asked to be allowed to apply for cancellation of removal and for voluntary departure. However, the Court declined to accept the application for cancellation of removal and denies the request for cancellation. The Court further denies the respondent's request for voluntary departure. Both of those denials are based upon the respondent's statutory ineligibility for either

cancellation of removal or voluntary departure due to his conviction for an aggravated felony.

Foregoing considered then the following orders are entered:

ORDER

IT IS ORDERED that the respondent's request for cancellation of removal and voluntary departure are denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Mexico on the charge contained in the Notice to Appear, which is dated July 22, 1999.

/s/ Michael K. Suarez
Michael K. Suarez
Immigration Judge